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Where Are You Going - Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis

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WHERE ARE YOU GOING? DESTINATION, JURISDICTION, AND THE WARSAW CONVENTION: DOES PASSENGER INTENT ENTER THE ANALYSIS?

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I. INTRODUCTION

IN A RECENT case governed by the Warsaw Convention,[1] the Fifth Circuit Court of Appeals specifically held that a passenger's intent has no bearing in establishing final destination for purposes of determining appropriate jurisdiction under the Warsaw Convention.[2] This holding is significant because final destination is one of the available fora in which one may bring a suit governed by the Warsaw Convention.[3] Perhaps most significant is that the holding was an express rejection of a New York district court decision to

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.T.N.S. 11, *reprinted in* 49 U.S.C. § 1502 (1988) (as amended) (adherence of the United States proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention].

[2] Swaminathan v. Swiss Air Transp. Co., 962 F.2d 387, 389 (5th Cir. 1992).

[3] Warsaw Convention, *supra* note 1, art. 28(1). Much of the text in this comment is dedicated to examining this very point.

the exact contrary.[4] While not exactly a circuit split, these two decisions have set the stage for dispute. To date, the Supreme Court has not addressed the issue of whether a passenger's intent has any effect on the determination of final destination for Warsaw Convention jurisdiction purposes, precisely the issue this comment will address.[5]

The Warsaw Convention only applies to international travel on an air carrier for hire.[6] Further, the Warsaw Convention specifically provides four possible judicial fora, one of which is a court at the place of destination.[7] In many cases involving round trip travel, courts have treated the place of origin of the trip as being the same as the destination for purposes of the Warsaw Convention.[8] While seemingly a simple matter, determining a given passenger's destination can be quite complex.[9]Indeed, there are nu-

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[4] *In re* Air Crash Disaster Near Warsaw, Poland, on May 9, 1987, 760 F. Supp. 30, 32 (E.D.N.Y. 1991).

[5] Whether the holdings of the two cases mentioned above, even if both were circuit court decisions, constitute a sufficient basis for Supreme Court review due to a circuit split is beyond the scope of this article.

[6] Warsaw Convention, *supra* note 1, art. 1(1).

[7] Warsaw Convention, *supra* note 1, art. 28(1).

[8] *See In re* Air Crash Disaster Near Cove Neck, N.Y., on Jan. 25, 1990, 774 F. Supp. 732, 739-42 (E.D.N.Y. 1991); Butz v. British Airways, 421 F. Supp. 127, 130-131 (E.D. Pa. 1976).

[9] An example may demonstrate some of the complexities of determining destination. A young German national and his wife are living in France; he is attending the Sorbonne while his wife is working to cover living expenses. The couple intends to return to Germany after the husband completes his education, and both desire to retain their German citizenship.

One spring, the husband learns that his father will donate the old family Mercedes to the young couple if they will pick it up. The young man decides that during spring break they will fly to Hamburg, Germany (his family's domicile), pick up the car, and then drive to Munich to attend a friend's wedding. Since the wife cannot get much time off from work, she will fly back to France after the wedding; the husband intends to drive to the Alps to do some climbing and then drive to their apartment in France.

Originally, the husband thought he would buy a one way ticket for himself since he was going to drive the car back, and a round trip ticket for his wife. The round trip for his wife was for a flight from France to Hamburg, with the return flight to France leaving from Munich instead of Hamburg (the wife was going to ride in the car from Hamburg to Munich). Because of the airline pricing schemes then in place, a round trip fare turned out to be much cheaper than a one way fare. So, in order to save money, the husband bought a round trip ticket. In fact, he bought a round trip ticket identical to that of his wife's (a round trip ticket from France to

merous situations in which destination may be difficult to determine.[10]

This comment will analyze jurisdiction under the Warsaw Convention as it is determined by destination. First, a brief history of the Convention will be presented because understanding the purpose of the Convention is paramount to analyzing its jurisdictional provisions. Next, the issues arising under analysis of jurisdiction will be presented. A discussion of the definition of "destination" follows, noting the various circumstances under which questions arise. And, finally, this comment will focus on whether the passenger's intent has, or should have, any impact on the determina-

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Hamburg to France would have been a few dollars cheaper, but because of the car's high milage, there was no guarantee it would make it to France, so the husband bought the round trip ticket thinking there was no harm in having a back-up plan that included traveling with his wife).

Suppose the flight carrying the couple from France to Hamburg crashed just short of Hamburg. Both the husband and the wife would have an interest in bringing any suits they may have in Germany, since they are German nationals. Germany also has an interest in maintaining the suits within its borders in order to protect German citizens. Assume also that the German procedural and liability laws are more favorable than those in France.

As noted above, final destination is one of the prescribed fora in which an individual may bring a suit governed by the Warsaw Convention. Assuming the flight is governed by the Warsaw Convention, and ignoring all of the other possible bases for jurisdiction, the foregoing scenario presents several interesting dilemmas. First, since the husband did not intend to use the return portion of his ticket (he only bought a round trip because it was cheaper), he might argue that Hamburg, Germany was his final destination, thus establishing proper jurisdiction in Germany. This would require a subjective analysis of passenger intent, and in the above detailed scenario, the fact that the return portion of the ticket may be viewed as a back-up provision would necessarily cloud the analysis.

Secondly, the wife might argue that Germany was her final destination because she in fact had two final destinations. The first destination was Hamburg and the Second was France because she was not traveling by air for her entire journey, making only the two separate legs by air, with the intervening leg by car. Her intent becomes problematic when looking to determine if she viewed her travel as one undivided arrangement for travel, or as several different travel arrangements.

A number of cases have addressed the issues of round trip tickets bought for their reduced fare, when there was no intent on the passenger's part to use the entire ticket, and travel involving breaks in the air transportation portions of the trip, such as long layovers or triangular routes with mixed modes of transportation. These cases, along with other situations giving rise to problems in determining final destination, are discussed in detail below in sections III and IV.

[10] *See infra* notes 135-175 and accompanying text.

tion of destination, and hence, jurisdiction under the Warsaw Convention.

II. A BRIEF HISTORY OF THE WARSAW CONVENTION[11]

The Warsaw Convention is the product of two international conferences. The first conference, which took place in Paris, established an interim committee that developed the body of the convention that was finalized at the second conference held in Warsaw, Poland in 1929.[12] The United States became a party to the Warsaw Convention by merely adhering it,[13] although the United States was not directly involved in the Convention's formulation.[14]

The United States later gave notice of denunciation of the Convention in 1965.[15] While denunciation of the Convention was withdrawn prior to its taking effect in 1966,[16] the fact that there was a denunciation at all illustrates the United States' dissatisfaction with some of the terms of the Warsaw Convention that go to the heart of the Convention's purposes, as well as some of the jurisdictional terms that are the subject of this comment.[17]

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[11] For an excellent and detailed description of the Warsaw Convention and its history, see Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

[12] *Id.* at 498. The fact that the conference finalizing the convention was held in Warsaw is what gave rise to the title of the Convention.

[13] *Id.* at 502. The Warsaw Convention provides that once the Convention has come into force, any state may adhere to it. Warsaw Convention, *supra* note 1, art. 38(1). The Warsaw Convention further describes the process by which new signatories are to adhere. Warsaw Convention, *supra* note 1, arts. 38(2), (3).

[14] Lowenfeld & Mendelsohn, *supra* note 11, at 502.

[15] *Id.* at 497. The Warsaw Convention provides that any contracting party may denounce the convention "by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties." Warsaw Convention, *supra* note 1, art. 39(1). Such denunciations take effect six months after the notification. *Id.* art. 39(2).

[16] Lowenfeld & Mendelsohn, *supra* note 11, at 497.

[17] The United States was almost immediately at odds with the low liability limits that were set in the Warsaw Convention. Lowenfeld & Mendelsohn, *supra* note 11, at 502-04. This disagreement has lead to several amendments to the Convention and an agreement between air carriers that do business in the United States. For a brief discussion of these issues see *infra* note 40 and the sources cited therein.

A. SCOPE AND DEFINITIONS

The Warsaw Convention only applies to international travel of passengers and international shipments of goods or baggage by air,[18] performed for hire, or gratuitously, by an "air transportation enterprise."[19] The Convention also applies to state-owned airlines,[20] but specifically excludes transportation effected pursuant to recognized international postal agreements.[21] International transportation, as defined in the Warsaw Convention, is transportation such that the places of departure and destination (of the segment of the transportation provided by an air carrier for hire) are within the territories of two different nations that are parties to the Convention.[22] Transportation may also be considered international for Warsaw Convention purposes if the places of departure and ultimate destination are solely within the territory of only one party to the Con-

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[18] Warsaw Convention, *supra* note 1, art. 1(1). "This Convention shall apply to all international transportation of persons, baggage, or goods . . . ." *Id.*

[19] *Id.* "[P]erformed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." *Id.*

[20] Warsaw Convention, *supra* note 1, art. 2(1). "This convention shall apply to transportation performed by the state or by legal entities constituted under public law . . . ." *Id.*

[21] *Id.* art. 2(2).

[22] *Id.* art. 1(2).

> For the purpose of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Id.

That is, a flight from Party Nation One to Party Nation Two. The nations that were original parties to the Warsaw Convention are listed in the preamble to the convention. *Id.* pmbl. A list of nations with which the United States is party to bilateral agreements governing civil transportation by air over the airspace of the signatory countries is provided in 49 U.S.C. § 1502 (1988, 1989 Supp. I, 1990 Supp. II, 1991 Supp. III & 1992 Supp. IV), giving the date the agreements were signed and entered into force, as well as the appropriate citation.

vention, if there is an agreed stopping place outside that party's territory.[23]

The qualification of a particular air travel arrangement as international travel is not lost if there is a stopover, or break, in the transportation; nor is it lost if there is a transshipment (intervening transportation provided by non-air carriers).[24] Furthermore, if successive carriers affect the transportation, the situation will be deemed as one undivided arrangement for transportation if the parties viewed the arrangement as involving a single operation.[25] This determination is made regardless of whether the arrangement involved one or a series of contracts.[26] If there are successive carriers, or more than one contract, the transportation is still international for Warsaw Convention purposes even if all of the transportation provided by one carrier, or covered by one contract, is performed within one territory.[27]

For example, if a traveler went to a travel agent and bought, as one undivided operation, transportation by air from Dallas to London, the transportation would still be classified as international travel for Warsaw Convention

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[23] Warsaw Convention, *supra* note 1, art. 1(2). That is, air travel from Party Nation One to Party Nation Two and then Back to Party Nation One, or air travel From Party Nation One to Nonparty Nation and back to Party Nation One.

[24] *Id.* "[w]hether or not there be a break in the transportation or a transshipment . . . ." *Id.*

[25] Warsaw Convention, *supra* note 1, art. 1(3). "Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation . . . ." *Id.* *Compare* Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc., 556 F. Supp. 124 (E.D.N.Y. 1983), *aff'd* 779 F.2d 38 (2d Cir. 1985) (finding, however, that subsequent transportation provided by a non-air carrier was not covered by the Warsaw Convention) and Arkwright-Boston Mfrs. Mut. Ins. Co. v. Intertrans Airfreight Corp., 777 F. Supp. 103, 108-9 (D. Mass. 1991) (same) *with* Abdul-Haq v. Pakistan Int'l Airlines, 420 N.Y.S.2d 848, 850 (N.Y. Sup. Ct. 1979) (finding that a successive motor carrier hired by the air carrier providing the transportation would be held liable under the Warsaw Convention since it had notice that the transportation was governed by the Warsaw Convention).

[26] Warsaw Convention, *supra* note 1, art. 1(3). "[w]hether [the transportation by air] has been agreed upon under the form of a single contract or of a series of contracts . . . ." *Id.*

[27] *Id.* "[a]nd it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party." *Id.*

purposes if Delta flew the traveler from Dallas to New York City, British Airways flew him to London, and he had a different ticket for each carrier's portion of the trip.[28] For the Warsaw Convention to apply in this situation, however, both the United States and the United Kingdom would have to be parties to the Convention.[29] If, on the other hand, the traveler bought a Dallas to London to Dallas round trip, and the United States was a party to the Warsaw Convention, it would apply whether or not the United Kingdom was a party. However, if the United States was not a party to the Warsaw Convention and the United Kingdom was, the Warsaw Convention would not apply.[30]

B. THE PURPOSES OF THE CONVENTION

There were two primary purposes of the Warsaw Convention. The primary goal was to limit and define the potential liability to the airline industry.[31] Facilitating travel was a related concern, as was encouraging the growth of the industry. Since the industry was in its infancy, the threat of a catastrophic accident generating huge liability was seen as a deterrent to attracting capital. Limiting liability removed one of the potential barriers to entry into the industry.[32]

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[28] Applying the provisions of the Warsaw Convention discussed in *supra* notes 18-27 and accompanying text.

[29] Warsaw Convention, *supra* note 1, art. 1(1), (2) (noting the "international" requirement and the requirement that both countries be High Contracting Parties). *See also* Lowenfeld & Mendelsohn, *supra* note 11, at 501 (giving examples using letters for parties and countries).

[30] Warsaw Convention, *supra* note 1, art. 1(2) (noting the language "if there is an agreed stopping place within a territory . . . even though that party is not a party to [the] convention."); *see also* Lowenfeld & Mendelsohn, *supra* note 11, at 501 (giving examples).

[31] Lowenfeld & Mendelsohn, *supra* note 11, at 499; *see also* Trans World Airlines, Inc. v. Franklin Mint Corp. 466 U.S. 243, 246 (1984) (same); Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788, 792 (3d Cir. 1992) (same); Reed v. Wiser, 555 F.2d 1079, 1089 (2d Cir. 1977) (same), *cert. denied*, 434 U.S. 922 (1977); Husserl v. Swiss Air Transp. Co., 388 F. Supp. 1238, 1248 (S.D.N.Y. 1975), *questioned in*, Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 546-52 (1991) (limiting liability).

[32] *Franklin Mint*, 466 U.S. at 256; Pierre v. Eastern Air Lines, Inc., 152 F. Supp. 486, 487 (D.N.J. 1957) (facilitating air traffic); P.T. Airfast Servs., Indonesia v. Superior Court for Siskiyou County, 188 Cal. Rptr. 628, 631-32 (Cal. Ct. App. 1983) (encouraging growth of the air industry).

The liability limitation would also make insurance more accessible and affordable. In addition, defining liability would reduce litigation and provide more certainty as to claims, thereby generating a benefit to both the industry and the passenger alike.[33]

The second purpose of the Warsaw Convention was to establish uniformity in the rules governing air travel because the industry was about to link countries with distinct legal environments.[34] This is apparent in the official title of the Warsaw Convention—Convention for the Unification of Certain Rules Relating to International Transportation by Air—and the unification of the rules regarding jurisdiction are at the heart of this comment. The Warsaw Convention, however, has failed in terms of creating absolute uniformity with respect to the treatment given jurisdictional questions arising under the Convention.[35]

1. Limit and Define Liability

Carriers are liable for damages for the death of, or injury to, a passenger resulting from an accident that occurs on an airplane,[36] including, by definition, accidents that occur embarking or disembarking.[37] Carriers are also liable for

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[33] Lowenfeld & Mendelsohn, *supra* note 11, at 499-500; *see also Reed*, 555 F.2d at 1089.

[34] Lowenfeld & Mendelsohn, *supra* note 11, at 498; *see also* Domangue v. Eastern Air Lines, Inc., 722 F.2d 256, 262 (5th Cir. 1984) (creating uniformity in damage actions in international air accidents); *Reed*, 555 F.2d at 1083 (same); Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 977 (S.D.N.Y. 1977) (same); Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 99 (W.D. Pa. 1975) (same), *rev'd & remanded*, 550 F.2d 152 (3d Cir. 1977); *Pierre*, 152 F. Supp. at 487-88 (unifying rules); Rosman v. Trans World Airlines, 314 N.E.2d 848, 854 (N.Y. 1974) (providing uniform rules).

[35] *See infra* notes 53-198 and accompanying text.

[36] Warsaw Convention, *supra* note 1, art. 17. "The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft . . . ." *Id.*

[37] Warsaw Convention, *supra* note 1, art. 17. "The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury sustained by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Id.*

damage to, or loss of, checked baggage.[38] Interestingly, carriers are even liable for damages resulting from delay.[39]

Aside from defining the liability of the carriers, the Warsaw Convention's largest effect is often found in the precise articles that limit liability. Specifically, absolute maximum amounts of liability, relating to the circumstances mentioned above, were set in the Convention.[40] These exact amounts were specified in terms of French francs, and were

[38] Warsaw Convention, *supra* note 1, art. 18(1). "The carrier shall be liable for damage sustained in the event of destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." *Id.*

[39] Warsaw Convention, *supra* note 1, art. 19. "The carrier shall be liable for damages occasioned by delay in the transportation by air of passengers, baggage, or goods." *Id.*

[40] Warsaw Convention, *supra* note 1, art. 22. Absolute limits were set for injury or death and carry on baggage, and an absolute limit per kilogram was set for checked baggage. *Id.* art. 22(1)-(3). Disagreement on the amounts specifically set occurred almost immediately. Lowenfeld & Mendelsohn, *supra* note 11, at 502-04. These disagreements led to numerous meetings and conferences culminating with what was known as the Hague Conference, which resulted in amendments to the Warsaw Convention in the form of the Hague Protocol. *See id.* at 502-09. The Hague Protocol raised the liability limits in a trade off on matters surrounding the presumption of liability and exceptions for the carrier. *Id.* The United States, dissatisfied with the liability limits as amended, never ratified the Hague Protocol. Civil Aeronautics Board, Order of the Civil Aeronautics Board Approving Increases in Liability Limitations of the Warsaw Convention and the Hague Protocol (1966) (*reprinted in* 49 U.S.C. § 1502 (1988)). In fact, the United States gave notice of its denunciation of the Warsaw Convention in 1965 solely because of liability limits that were seen as too low. *Id.* That denunciation was withdrawn in 1966 following an agreement that had the effect of raising the liability limits. *Id.* (citing Civil Aeronautics Board Agreement 18900). The agreement embodied in CAB 18900 was what is known as the Montreal Agreement, which was not an amendment to the Warsaw Convention or a treaty; rather, it was a contractual agreement among the world's major air carriers exposing them to liability essentially contractual in nature. *Id.* *See* Eloise Cotugno, Comment, *No Rescue in Sight for Warsaw Plaintiffs From Either Courts or Legislature—Montreal Protocol 3 Drowns in Committee*, 58 J. AIR L. & COM. 745 (1993) (providing an excellent summary of the liability limits and the United States' dissatisfaction with them, leading to discussions of the Hague Protocol (1955), the Montreal Interim Agreement (1966), the Guatemala Protocol (1971) and the Montreal Protocols (1975), all addressing the liability limit issue); *see also Floyd*, 499 U.S. at 546-52; Marian N. Leich, *The Montreal Protocols to the Warsaw Convention on International Carriage by Air*, 76 AM. J. INT'L L. 412 (1982); Jeffrey A. Cahn, Comment, *Saks: A Clarification of the Warsaw Convention Passenger Liability Standards*, 16 U. MIAMI INTER-AM. L. REV. 539, 540-43 (1985).

tied to a gold standard, convertible to any national currency.[41]

While the airlines received an enormous benefit under the Warsaw Convention in the form of limitations on their ultimate liability, passengers also received a large benefit in the form of a presumption of the carrier's negligence. That is, carriers are presumed negligent in the event of an accident.[42] This presumption is subject to certain specific exceptions. If the carrier can show that it took all the necessary measures to avoid damage, or that taking such measures would be impossible or extremely impracticable, the carrier will not be held liable.[43] The carrier may also show that the injured party was contributorily negligent and thereby reduce its exposure to liability at least partially, if not wholly.[44]

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[41] Warsaw Convention, *supra* note 1, art. 22(4). "The sums mentioned above shall be deemed to refer to the French franc consisting of [65½] milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures." *Id.*; *see also Franklin Mint*, 466 U.S. at 251-53 (stating that changes in the value of gold and repeal of the official act which set the price of gold in the United States did not change the requirement for courts to apply the Warsaw Convention's liability limits); Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 737 F.2d 456, 457-58 (5th Cir. 1984) (determining the liability for loss is not tied to the free market price of gold), *cert. denied*, 469 U.S. 1186 (1985).

[42] Warsaw Convention, *supra* note 1, art. 20. *See also Franklin Mint*, 466 U.S. 243 (dealing with cargo pursuant to Article 18 of the Warsaw Convention); *In re* Air Crash in Bali, Indonesia on Apr. 22, 1974, 684 F.2d 1301, 1305 (9th Cir. 1982); Dunn v. Trans World Airlines, 589 F.2d 408, 410 (9th Cir. 1978); Martinez Hernandez v. Air France, 545 F.2d 279, 281-82 (1st Cir. 1976) (finding the Warsaw Convention created strict liability), *cert. denied*, 430 U.S. 950 (1977); Day v. Trans World Airlines, 393 F. Supp. 217, 221 (S.D.N.Y. 1975); *Husserl*, 388 F. Supp. at 1242.

[43] Warsaw Convention, *supra* note 1, art. 20(1). "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." *Id.*; *see also Air Crash at Bali*, 684 F.2d at 1305 (taking all measures appropriate to the risk); Manufacturers Hanover Trust Co. v. Alitalia Airlines, 429 F. Supp. 964, 967 (S.D.N.Y. 1977) (taking all measures reasonably appropriate to the risk), *aff'd*, 573 F.2d 1292 (2d Cir 1977), *cert. denied*, 435 U.S. 971 (1978); Schedlmayer v. Trans Int'l Airlines, 416 N.Y.S.2d 461, 464-65 (N.Y. Civ. Ct. 1979) (same).

[44] Warsaw Convention, *supra* note 1, art. 21. "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." *Id.*; *see also* Eichler v. Lufthansa German Airlines,

2. *Establish Uniformity*

The second purpose of the Warsaw Convention was to create uniformity in the laws governing international air travel.[45] The rationale behind this purpose centered around the fact that each country that was joined by air travel had varied laws.[46] Among the areas that uniformity addressed in the Warsaw Convention were passenger tickets,[47] baggage checks,[48] and air waybills.[49]

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794 F. Supp. 127, 130 (S.D.N.Y. 1992) (holding that contributory negligence reduces liability, not eliminating it); *Schedlmayer*, 416 N.Y.S.2d at 464-65.

[45] Lowenfeld & Mendelsohn, *supra* note 11, at 498; *see also supra* note 34 and accompanying text.

[46] *Domangue*, 722 F.2d at 262; *Reed*, 555 F.2d at 1090-91; *Karfunkel*, 427 F. Supp. at 977; *Evangelinos*, 396 F. Supp. at 98-99; *See* Carl E. B. McKenry, Jr., *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 218-19 (1963) (noting that the place of accident was originally contemplated by the drafters of the Warsaw Convention as a possible basis for jurisdiction, but that it was removed from the final version, due, in part, to the fear that the "accident could occur at a place having a poorly organized or underdeveloped judicial system, or none at all . . . .").

[47] Warsaw Convention, *supra* note 1, art. 3.

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
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> (a) The place and date of issue;
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> (b) The place of departure and of destination;
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> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in the case of necessity, and that if he exercises that right, the alteration will not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Id.; *see also In re* Air Crash Disaster at Warsaw, Poland, on Mar. 14, 1980, 705 F.2d 85, 89-90 (2d Cir. 1983) (finding that eight and one half point size type on the liability provisions of a ticket failed to give adequate notice; rather, ten point type is required); Lisi v. Alitalia-Linee Aeree Italiane, S.P.A., 370 F.2d 508, 513-14 (2d Cir. 1966) (finding that if the type size on the ticket is too small to give adequate notice to the passenger, the liability limits of the Warsaw Convention would not apply), *aff'd*, 390 U.S. 455 (1968).

[48] Warsaw Convention, *supra* note 1, art. 4. "(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge of himself, the carrier must deliver a baggage check." *Id.* (stating particular requirements for the contents of the baggage check similar to those for tickets); *see also Lisi*, 370 F.2d 513-14 (finding the print size on the baggage check was too small to give adequate notice).

[49] Warsaw Convention, *supra* note 1, arts. 5-16 (providing similar requirements for the particular contents of waybills in Article 8); *see also* Bianchi v. United Air Lines, 587 P.2d 632 (Wash. App. 1978) (addressing the requirements for waybills).

Uniform procedures were also established. A two year statute of limitations found its way into the convention;[50] and, plaintiffs were limited by only being able to bring suit against the carrier who was performing the part of the transportation involved in the accident.[51] Further, the Warsaw Convention provided for uniform procedures in terms of jurisdiction,[52] discussed below.

III. JURISDICTION UNDER THE WARSAW CONVENTION

Determining jurisdiction under the Warsaw Convention is a four step process. First, before the jurisdictional article of the Warsaw Convention even comes into play, the courts must answer the threshold question of whether the Convention applies at all.[53] The Warsaw Convention only applies to international travel by air.[54] Accordingly, if the travel in-

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[50] Warsaw Convention, *supra* note 1, art. 29(1). "The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." *Id.* The Warsaw Convention further provided that "[t]he method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." *Id.* art. 29(2); *see* Alltransport, Inc. v. Seaboard World Airlines, 349 N.Y.S.2d 277 (N.Y. Civ. Ct. 1973) (finding that the period of limitations did not run when the plane carrying goods landed, but rather when the goods were turned over to the plaintiff (i.e. when they were out of the control of the carrier)).

[51] Warsaw Convention, *supra* note 1, art. 30(1), (2). Where successive carriers are involved, each carrier is a contracting party with respect to that part of the transportation performed under his supervision, and, unless a carrier assumes liability for the entire transportation, the passenger can only sue the carrier involved in the accident. *Id.*

[52] Warsaw Convention, *supra* note 1, art. 28.

[53] McKenry, *supra* note 46, at 205.

[54] Warsaw Convention, *supra* note 1, art. 1(1). The determination of whether travel is international for Warsaw Convention purposes is discussed at length, *supra* notes 22-30 and accompanying text. For a discussion of what qualifies as international travel, thereby bringing the transportation under the provisions of the Warsaw Convention, see Stratis v. Eastern Air Lines, 682 F.2d 406, 409-14 (2d Cir 1982) (finding a contract for international travel had been made where a prepaid ticket for international flight had been prepared, and the passenger could not terminate the international portion of the flight without violating immigration rules, even though the ticket had not been validated); *Lisi*, 370 F.2d at 510 (noting that the carrier conceded that the transportation was international); *Ackwright-Boston*, 777 F. Supp. at 106-07 (noting the shipment of a machine from the United States to Ireland was international transportation for Warsaw Convention purposes); Rabinowitz

volved does not fit the Convention definition of international air travel, the Warsaw Convention does not apply.

Once a court has found that the travel is international in nature and the Convention applies, a three step evaluation of jurisdiction under Article 28 of the Warsaw Convention must be followed.[55] First, "treaty jurisdiction" must exist under the terms of Article 28.[56] Second, the court must have subject matter jurisdiction.[57] And third, the court must be able to exercise personal jurisdiction over the defendant.[58]

A. TREATY JURISDICTION[59]

Article 28 of the Warsaw Convention provides four specific fora in which a plaintiff may bring an action against a carrier.[60] Specifically, an action may be brought before a court in the territory (1) of the domicile of the carrier, (2) the carrier's principal place of business, (3) where the car-

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v. Scandinavian Airlines, 741 F. Supp. 441, 443 (S.D.N.Y. 1990) (finding the Warsaw Convention was applicable where a passenger's contract provided for travel originating and terminating in New York, with agreed stopping places in Copenhagen and Moscow); Lee v. China Airlines, Ltd., 669 F. Supp. 979, 980 (C.D. Cal. 1987) (applying the Warsaw Convention to travel pursuant to round trip airline ticket from Hong Kong to San Francisco); *Karfunkel*, 427 F. Supp. at 977-78 (same); Chandler v. Jet Air Freight, Inc., 370 N.E.2d 95, 98 (Ill. App. Ct. 1977) (finding transportation international in nature by looking to the terms of the contract (ticket)).

[55] *See* Calvin F. David & Sara Lawrence, *Jurisdiction Under the Warsaw Convention and the Death on the High Seas Act—Is there a Choice?*, 53 INS. COUNS. J. 425, 426-27 (1985); *McKenry, supra* note 46; Note, *Article 28 of the Warsaw Convention: A Suggested Analysis*, 50 MINN. L. REV. 697 (1966).

[56] *See infra* notes 59-79 and accompanying text.

[57] *See infra* notes 88-104 and accompanying text.

[58] *See infra* notes 105-136 and accompanying text.

[59] There may be some confusion between treaty jurisdiction and "convention" jurisdiction. For purposes of this comment, convention jurisdiction refers to the finding that the transportation is international in nature, and, hence, the Warsaw Convention applies. Treaty jurisdiction, on the other hand, refers to jurisdiction conferred upon a court by the terms of the treaty. This should also serve to distinguish between the three step process and the four step process mentioned above. The first step in the four step process is the determination that the transportation is international and the Warsaw Convention applies. The next three steps are the same as those of the three step procedure referred to in many cases and articles. These three steps, detailed below, address treaty, subject matter, and personal jurisdiction as prescribed by the terms of the Warsaw Convention.

[60] Warsaw Convention, *supra* note 1, art. 28(1).

rier has a place of business through which the contract for transportation was made, or (4) at the place of destination.[61] In determining treaty jurisdiction, the courts apply their own procedural rules.[62]

In order for treaty jurisdiction to exist, one of the four listed fora must be appropriate, and the burden is on the plaintiff to make such a showing.[63] Treaty jurisdiction means that a court of a given nation is an appropriate forum for the suit.[64] Territory, as used in the Warsaw Convention, refers to the territory of the High Contracting Parties.[65] A determination that treaty jurisdiction exists, merely establishes that the courts of a given nation are an appropriate forum.[66] In other words, the Warsaw Convention does not confer jurisdiction in specific political subdivisions, and courts will apply their own internal law to determine if venue is proper, even if treaty and subject matter jurisdiction are proper.[67]

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[61] *Id.*

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before [1] the court of the domicile of the carrier or [2] of his principal place of business, or [3] where he has a place of business through which the contract has been made, or [4] before the court at the place of destination.

Id.

[62] Warsaw Convention, *supra* note 1, art. 28(2). "Questions of procedure shall be governed by the law of the court to which the case is submitted." *Id.*; *see* Clark v. United Parcel Serv., Inc., 778 F. Supp. 1209, 1211 (S.D. Fla. 1991) (finding that even though a federal cause of action existed, local law would govern); Hill v. United Air Lines, 550 F. Supp. 1048, 1053-54 (D. Kan. 1982); Fabiano Shoe Co. v. Alitalia Airlines, 380 F. Supp. 1400, 1402-03 (D. Mass. 1974).

[63] Vergara v. Aeroflot "Soviet Airlines", 390 F. Supp. 1266, 1268-69 (D. Neb. 1975).

[64] *In re* Air Disaster Near Cove Neck, N.Y., on Jan. 25, 1990, 774 F. Supp. 732, 733 (E.D.N.Y. 1991); *Fabiano Shoe*, 380 F. Supp. at 1402-03.

[65] Eck v. United Arab Airlines, 360 F.2d 804, 812-15 (2d Cir. 1966).

[66] *Id.*; Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 854-55 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); *Hill*, 550 F. Supp., at 1053; *Air Crash Disaster at Cove Neck*, 774 F. Supp. at 733; Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683, 686 (N.D. Ill. 1964); Pitman v. Pan American World Airways, 223 F. Supp. 887 (E.D. Pa. 1963); Mason v. British Overseas Airways Corp., 5 Av. Cas. (CCH) 17,121 (S.D.N.Y. 1956); *see also* Charles E. Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 McGILL L.J. 352 (1963); *Article 28 of the Warsaw Convention: A Suggested Analysis*, *supra* note 55, at 698-705.

[67] *Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 732.

All four of the fora listed in Article 28 have been the subject of significant litigation.[68] Courts have focused on the specific provisions of Article 28 to determine jurisdiction. Numerous courts have determined that a carrier can be domiciled in only one location.[69] They have also dismissed cases for lack of subject matter jurisdiction based on the fact that the suit was not brought in the place of the carrier's domicile, and all other possibilities for jurisdiction listed in Article 28 were not present.[70]

Similar to place of domicile, courts have determined that carriers can only have one principal place of business.[71] Determining exactly where that one principal place of business is, however, has also been the subject of litigation.[72] As in the case of domicile, courts have dismissed cases for lack of subject matter jurisdiction because the suit was not brought in the principal place of business, and another basis for jurisdiction available under Article 28 was not present.[73]

As noted above, a place where the carrier does business, through which the contract for transportation was made, is another possible basis for jurisdiction under Article 28 of the Warsaw Convention.[74] Cases have been brought in

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[68] *See infra* notes 69-75 and accompanying text.

[69] *See Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 722; People *ex rel.* Compagnie Nationale Air France v. Giliberto, 383 N.E.2d 977, 981 (Ill. 1978), *cert. denied*, 441 U.S. 932 (1979).

[70] *See* Swaminathan v. Swiss Air Transp. Co., 962 F.2d 387, 389-90 (5th Cir. 1992); *Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 726; Recumar, Inc. v. KLM Royal Dutch Airlines, 608 F. Supp. 795, 798 (S.D.N.Y. 1985); *Hill*, 550 F. Supp. at 1053-54; Butz v. British Airways, 421 F. Supp. 127, 131 (E.D. Pa. 1976); *see also* McKenry, *supra* note 46, at 208-09 (stating that domicile is the place of incorporation and that a carrier may only have one domicile).

[71] *See Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 722; *Recumar*, 608 F. Supp. at 798; Nudo v. Sabena Belgian World Air Lines, 207 F. Supp. 191, 192 (E.D. Pa. 1962).

[72] *See supra* note 69; *see also* Lowenfeld & Mendelsohn, *supra* note 11, at 522-26.

[73] Gayda v. LOT Polish Airlines, 702 F.2d 424, 425 (2d Cir. 1983) (holding that the Warsaw Convention serves as a bar to jurisdiction for all cases falling outside its terms); *Recumar*, 608 F. Supp. at 798; *Butz*, 421 F. Supp. at 131.

[74] *See supra* note 61 and accompanying text; *see also Eck*, 360 F.2d at 814; *Air Disaster Near Cove Neck*, 774 F. Supp. at 729-31; *Recumar*, 608 F. Supp. at 798 (noting that the place of issue of an air waybill was an appropriate location for basing jurisdiction on the place where the contract was made).

courts where such contracts were not present; consequently the cases have been dismissed for lack of jurisdiction.[75] But, in all of the possible bases for jurisdiction listed above, courts have also found that an appropriate basis for subject matter jurisdiction can exist under Article 28.[76]

Destination is perhaps the broadest jurisdictional basis contained in Article 28 of the Warsaw Convention. This is because, by definition, all international air travel, and therefore, all travel that is subject to the provisions of the Warsaw Convention, must have a final destination.[77] Destination may be in any country that is a party to the Warsaw Convention,[78] whereas a carrier can have only one principle place of business[79] and one domicile.[80] Destination, as a basis for jurisdiction under the Warsaw Convention, is discussed below.

1. Venue v. Jurisdiction.

Courts have disagreed over whether Article 28 refers to venue or jurisdiction.[81] In *Doering v. Scandinavian Airlines*

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[75] Jamil v. Kuwait Airways Corp., 773 F. Supp. 482, 484 (D.D.C. 1991) (noting that the plaintiff had not made any allegations as to where the contract was booked, when arrangements for a return flight were made in Pakistan); Boyar v. Korean Air Lines, 664 F. Supp. 1481, 1485 (D.D.C. 1987), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

[76] Proof of this can be found in the myriad cases that address issues other than jurisdiction, such as liability limits, the statute of limitations, and the standard of proof as evidenced by the large volume of note cases annotating the Warsaw Convention in West's version of the United States Code (U.S.C.A.), as well as the Lawyer's Cooperative's version (U.S.C.S.).

[77] Article 1 of the Warsaw Convention defines international travel on the basis of place of departure and place of destination, and, in the instance where the two are the same, upon the locus of a stopping place that is outside the boundaries of the place of departure and destination. Hence, travel must have a destination in order for the Warsaw Convention to apply at all. Warsaw Convention, *supra* note 1, art. 1(2).

[78] For a discussion of the classification of travel as international for Warsaw Convention purposes based on the places of departure and destination being within the territory of a contracting party, see *supra* note 22.

[79] *See supra* note 70.

[80] *See supra* note 72.

[81] David & Lawrence, *supra* note 55, at 426; *see also* D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 292-93 (1937). Some cases holding that Article 28 of the Warsaw Convention prescribes jurisdiction are: *Nudo*, 207 F. Supp. at 192; Winsor v. United Air Lines, 153 F. Supp. 244, 247 (E.D.N.Y. 1957);

System[82] a California district court noted that there was indeed disagreement over the issue and held subsequently that Article 28 addresses venue.[83] Thus, a motion to dismiss based on lack of subject matter jurisdiction would fail.[84] Other courts, however, have held that Article 28 of the Warsaw Convention prescribes jurisdiction.[85] In such courts, venue is only addressed after treaty and subject matter jurisdiction are established.[86] The general consensus currently holds that Article 28 of the Warsaw Convention is a jurisdictional provision.[87]

B. SUBJECT MATTER JURISDICTION

Once treaty jurisdiction is established, the courts move to the question of whether subject matter jurisdiction is present.[88] Some state courts have found that jurisdiction exists because a claim is based on negligence, or even contract.[89] One court, noting that a suit was proper, found that without even referring to the Montreal Agreement[90] in the complaint, since the Montreal Agreement was applicable as an amendment to the Warsaw Convention and the carrier

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Berner v. United Air Lines, Inc., 147 N.E.2d 732 (N.Y. 1957). Some other cases holding that Article 28 of the Warsaw Convention addresses venue are: *Eck*, 360 F.2d at 814; Brown v. Compagnie Nationale Air France, 8 Av. Cas. (CCH) ¶ 17,272 (S.D.N.Y. 1962); Spencer v. Northwest Orient Airlines, Inc., 201 F. Supp. 504, 505-06 (S.D.N.Y. 1962); Dunning v. Pan American World Airways, 4 Av. Cas. (CCH) ¶ 17,394, 17,395 (D.D.C. 1954); *Mason*, 5 Av. Cas. (CCH) at ¶ 17,121.

[82] 329 F. Supp. 1081 (C.D. Cal. 1971).

[83] *Id.* at 1082.

[84] *Id.*

[85] Smith v. Canadian Pac. Airways, 452 F.2d 798, 800-01 (2d Cir. 1971).

[86] *Id.*

[87] *Id.*; *see also In re* Air Crash Disaster in Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1271-82 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *In re* Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1161-78 (5th Cir. 1987), *vacated* 490 U.S. 1032 (1989); *Gayda*, 702 F.2d at 425; *Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 736.

[88] *Smith v. Canadian*, 452 F.2d at 800-01.

[89] Lowenfeld & Mendelsohn, *supra* note 11, at 522-26, 575-78.

[90] *See supra* note 40.

agreed that it was applicable, the carrier would be bound by its provisions, absent a valid defense.[91]

It is possible for federal subject matter jurisdiction to exist in a case governed by the Warsaw Convention based on diversity.[92] The Warsaw Convention has been held not to encompass a political question.[93] Courts have also found that federal question jurisdiction may exist in a Warsaw Convention case.[94] Nonetheless, whether the Warsaw Convention itself creates an independent cause of action merits separate consideration.

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[91] *Dunn*, 589 F.2d at 413. *But see Notarian*, 244 F. Supp. 874 (holding that the Warsaw Convention must be plead before procedural motions based on the Warsaw Convention may be made).

[92] Stud v. Trans Int'l Airlines, 727 F.2d 880, 881-82 (9th Cir. 1984) (addressing both federal question and diversity jurisdiction). *But see* Halmos v. Pan Am. World Airways, 727 F. Supp. 122 (S.D.N.Y. 1989) (finding that there was no treaty jurisdiction because there was not complete diversity).

[93] *Franklin Mint Corp.*, 466 U.S. at 254. Finding that the Warsaw Convention concerned a political question would, of course, remove jurisdiction of the matters governed by it from the courts. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). For discussion of the political question doctrine, see Baker v. Carr, 369 U.S. 186 (1962) (announcing many of the types of cases that concern political questions, such as foreign relations, determination of dates of duration of hostilities, validity of enactments, and recognition of governments); *see also* Goldwater v. Carter, 444 U.S. 996 (1979) (foreign relations); Gilligan v. Morgan, 413 U.S. 1 (1973) (regulating the militia); Powell v. McCormack, 395 U.S. 486 (1969) (determining qualifications of members of congress); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (power to levy tax). In essence, the political question doctrine holds that the courts do not have jurisdiction where there is a:

> textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. Obviously, the Warsaw Convention does not implicate any of these areas, and, particularly, the jurisdictional provision of the convention does not, as it specifically designates the courts of the forum before which the suit is brought as competent to decide jurisdictional issues consistently with their own local rules. Warsaw Convention, *supra* note 1, art. 28(2). Conceivably, orders of the Civil Aeronautics Board could conflict with certain judicial determinations, but not with respect to jurisdiction, and that issue is beyond the scope of this comment.

[94] *Stud*, 727 F.2d at 880.

1. *Does The Warsaw Convention Create An Independent Cause of Action?*

In analyzing subject matter jurisdiction, the issue of whether the Warsaw Convention creates an independent cause of action, and hence, federal question subject-matter jurisdiction, has received considerable attention. In fact, this very question was a hotly debated topic for some time.[95] When the United States first adopted the Warsaw Convention, the common wisdom was that the convention created an independent cause of action.[96] Nevertheless, several courts began to hold that the Warsaw Convention did not create an independent cause of action, and that some other basis for subject-matter jurisdiction had to be relied upon.[97]

Two landmark cases, decided in the Second Circuit, set the tone for subject-matter jurisdiction under the Warsaw Convention. For more than two decades, these cases stood for the proposition, among other things, that the Warsaw Convention did not create an independent cause of action.[98] Subsequently, federal courts only dealt with Warsaw Convention cases if diversity jurisdiction requirements were met.[99] First, in *Komlos* the Second Circuit affirmed, albeit impliedly, dicta in the district court's opinion that the War-

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[95] *See* G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323 (1959); Patricia S. Hohl, Note, *Trend for Finding an Independent Cause of Action in the Warsaw Convention Strengthened by Removal of Jurisdictional Problems*, Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, 737 F.2d 456 (5th Cir. 1984), 9 SUFFOLK TRANSNAT'L L.J. 67 (1985).

[96] *See* Glenn Pogust, Note, *The Warsaw Convention—Does it Create a Cause of Action?*, 47 FORDHAM L. REV. 366 (1978); Note, *The Warsaw Convention Creates a Cause of Action for Wrongful Death*—Benjamins v. British European Airways, 38 MD. L. REV. 120 (1978).

[97] Zousmer v. Canadian Pac. Air Lines, 307 F. Supp. 892, 899 (S.D.N.Y. 1969); *Notarian*, 244 F. Supp. at 877.

[98] Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), *overruled by* Benjamins v. European Airways, 572 F.2d 913 (2d Cir. 1978); Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954), *overruled by Benjamins*, 572 F.2d 913 (2d Cir. 1978).

[99] *Noel*, 247 F.2d at 997; *Komlos*, 209 F.2d at 440; *see also Zousmer*, 307 F. Supp. at 899 (no independent cause of action); *Notarian*, 244 F. Supp. 874 (same); Spencer v. Northwest Orient Airlines, Inc., 201 F. Supp. 504 (S.D.N.Y. 1962) (noting that the Warsaw Convention does not create any new substantive rights); *Fernandez*, 156 F. Supp. at 877, (S.D.N.Y. 1957) (same).

saw Convention did not create an independent cause of action.[100] Second, in *Noel* the Second Circuit specifically held that the reasoning in *Komlos* was correct in that the Warsaw Convention did not create an independent cause of action.[101]

This reasoning was generally followed for more than two decades;[102] then, in 1978, the Second Circuit reevaluated its decisions in *Komlos* and *Noel*, and held that the Warsaw Convention did create an independent cause of action for wrongful death in *Benjamins v. British European Airways*.[103] Since *Benjamins*, other courts have followed the Second Circuit's lead, holding that the Warsaw Convention does create an independent cause of action, thereby satisfying federal question subject matter jurisdiction requirements.[104]

C. PERSONAL JURISDICTION

As noted above, the third test that must be met for jurisdiction under the Warsaw Convention is whether the court before which the action is brought has jurisdiction over the defendant.[105] The distinction between treaty jurisdiction and personal jurisdiction may seem confused in analysis of cases applying Article 28 of the Warsaw Convention. Many

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[100] *Komlos*, 209 F.2d at 438.

[101] *Noel*, 247 F.2d at 679. For an in depth discussion of the cause of action under the Warsaw Convention, and a particularly critical contemporaneous discussion of the holdings in *Komlos* and *Noel*, see Calkins, *supra* note 95.

[102] *See, e.g.*, cases cited *supra* at note 97.

[103] 572 F.2d 913, 916 (2d Cir. 1978).

[104] *E.g.*, Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, 737 F.2d 456, 458 (5th Cir. 1984); *Stud*, 727 F.2d 880; Enayati v. Lufthansa German Airlines, 714 F.2d 75 (9th Cir. 1983); *In re* Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 415 (9th Cir. 1983); *see also* Floyd B. Chapman, Note, *Exclusivity and the Warsaw Convention: In Re Air Disaster At Lockerbie, Scotland*, 23 U. MIAMI INTER-AM. L. REV. 493 (1992) (discussing many of the cases listed above as to whether the Warsaw Convention creates an independent cause of action, focusing on whether it provides the exclusive cause of action for air disaster cases brought under the convention. The article addresses the preemption of state law issue and follows the progression of the courts noted in the text accompanying *supra* notes 94 to 102, finding that the Second and Fifth Circuits closed the door on state law based claims in *Air Crash Disaster in Lockerbie*, 928 F.2d at 1267; and *Boehringer-Mannheim Diagnostics*, 737 F.2d at 458, respectively).

[105] *See supra* note 58 and accompanying text.

of the cases identified above, dealing with issues such as the principle place of business, domicile, and place of business through which the contract was made, seem surprisingly close to what students of American jurisprudence recognize as sufficient contacts analysis for purposes of personal jurisdiction of the courts along the lines of doctrine set forth in cases such as *International Shoe*[106] and *World-Wide Volkswagen.*[107] Such confusion is further borne out by the debate, discussed above, over whether Article 28 of the Warsaw Convention is a venue or jurisdiction provision.[108]

The source of the confusion arises as a result of the nature of the American legal system in that the United States is broken into many different political subdivisions, each with their own infrastructure of courts, and the division of federal courts into different circuits and districts. The contrast between the provisions of Article 28(1) and Article 28(2) of the Warsaw Convention sets the stage.[109] Article 28(1) lists specific places where an action may be brought, and Article 28(2) provides that the courts apply local rules to questions of procedure.[110]

Much of this confusion can be resolved by taking the national scope of Article 28(1) of the Warsaw Convention into consideration. As noted above, treaty jurisdiction conferred under Article 28(1) of the Warsaw Convention is national and does not refer to political subdivisions or specific courts.[111] But, once national treaty jurisdiction is established, courts still apply local law, under the provisions of Article 28(2), as to whether a specific court has personal jurisdiction over the defendant.[112]

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[106] 326 U.S. 310 (1945) (requiring a party to have minimum contacts with the forum state in order for jurisdiction to be proper).

[107] 444 U.S. 286 (1980) (holding that, even given minimum contacts, a party must realistically foresee being haled into a specific court in order for jurisdiction to be proper).

[108] *See supra* notes 95-104 and accompanying text.

[109] *See* Charles E. Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 McGILL L.J. 352 (1963).

[110] Warsaw Convention, *supra* note 1, art. 28(1), (2).

[111] *See supra* notes 59-69 and accompanying text.

[112] *See supra* notes 64-69 and accompanying text.

Merely because a district court determines that the courts of the United States are an appropriate jurisdiction in which the case may be brought under one of the four specific provisions of Article 28(1) does not mean that the district court will necessarily exercise personal jurisdiction over the defendant.[113] For example, a contract for round trip transportation between New Orleans and London may have been made and sold through a sales office in New Orleans, thereby satisfying the third jurisdictional provision of Article 28(1).[114] But, conceivably, the carrier may not have any offices in that district and may not perform any flights into or out of any airports in that district. As such, the district court may well determine that the carrier did not have sufficient contact with the forum to satisfy personal jurisdiction.[115]

In addressing personal jurisdiction, the courts apply traditional minimum contacts analysis (requiring some contact with the forum jurisdiction).[116] Many state's long arm statutes will bring a carrier within the jurisdiction of the courts.[117] Courts also have analyzed personal jurisdiction based on the place of business through which the contract for transportation was made, applying theories of agency.[118] Courts have also held that jurisdiction was not proper due to a lack of adequate service of process.[119]

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[113] *See supra* notes 53-58 and accompanying text, discussing the series of analytical steps a court addresses in determining its jurisdiction.

[114] The place through which the contract for carriage was made, discussed *supra*, at notes 73-75 and accompanying text.

[115] In one case, the courts determined that even though the suit was properly brought in America, the courts did not have personal jurisdiction over the defendant where the suit alleged improper maintenance of a walkway by the Copenhagen airport authority and the Kingdom of Denmark because those defendants did not have enough contacts with the United States. Schmidkunz v. Scandinavian Airlines Sys., 628 F.2d 1205 (9th Cir. 1980). The Supreme Court of Utah also applied a doing business/minimum contacts analysis in Mabud v. Pakistan Int'l Airlines, 717 P.2d 1350 (Utah 1986).

[116] *See supra* notes 73-75, 112-114, and accompanying text.

[117] Lowenfeld & Mendelsohn, *supra* note 11, at 575-78.

[118] *Id.* at 522-26, 575-78.

[119] *Id.*

1. Removal and Forum Non Conveniens

Actions brought under the Warsaw Convention in state courts may be removed to federal courts pursuant to 28 U.S.C. § 1441 if the action could have commenced originally in federal court.[120] In *Mertens v. Flying Tiger Line, Inc.*[121] the Second Circuit held that, in a case governed by the Warsaw Convention, the defendant could move for a transfer under 28 U.S.C. § 1404(a) and could object to venue under 28 U.S.C. § 1391.[122] There has been dispute, however, over whether the Warsaw Convention precludes a court from applying its local rules for determining appropriate venue.[123]

At least one court has addressed the issue of whether an action falling under the terms of the Warsaw Convention can be removed on the basis of *forum non conveniens.*[124] In *Air Crash Disaster Near New Orleans,* the plaintiffs argued that the doctrine of *forum non conveniens* should not be applicable in a case governed by the Warsaw Convention because the language of Article 28(1) gave the plaintiff the absolute choice of a forum.[125] The Fifth Circuit Court of Appeals answered by holding to the contrary—*forum non conveniens* is applicable in Warsaw Convention cases—noting that whether the doctrine applied in cases governed by the Warsaw Convention was raised only once before, and the court

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[120] David & Lawrence, *supra* note 55, at 428.

[121] 341 F.2d 851 (2d Cir. 1964), *cert. denied,* 382 U.S. 816 (1965), *overruled by,* Chan v. Korean Air Lines, 490 U.S. 122 (1989).

[122] *Id.* at 855-58. (noting that such issues would be governed by the procedural rules of the court before which the motion was presented, and not the provisions of the Warsaw Convention)

[123] *See* discussion *supra* notes 95-104 and accompanying text as to the dispute over the status of Article 28 of the Warsaw Convention as a venue or jurisdiction provision.

[124] *Air Crash Disaster Near New Orleans,* 821 F.2d at 1161-78 (applying *forum non conveniens* doctrine in a Warsaw Convention case); *see also* Compagnie National Air France v. Giliberto, 383 N.E.2d 977, 984-88 (Ill. 1978) (finding the lower court abused its discretion in upholding jurisdiction in Illinois where the only connection the airline had with the forum was the maintenance of a sales office in Illinois).

[125] *Air Crash Disaster Near New Orleans,* 821 F.2d at 1160.

declined to decide the issue.[126] The court also noted that other courts had applied the doctrine of *forum non conveniens* in Warsaw Convention cases without making reference to any potential conflict with the terms of Article 28(1).[127]

Along similar lines, courts have also grappled with choice of law issues.[128] Particularly, the court in *Air Crash Disaster Near New Orleans* addressed which law to apply, that of Louisiana or Uruguay.[129] But, the court addressed two additional interesting questions: 1) whether choice-of-law issues entered the *forum non conveniens* analysis; and 2) whose version of the *forum non conveniens* doctrine to apply.[130] First, the court held that choice-of-law issues should be avoided when addressing *forum non conveniens* questions.[131] Second, the court held that the federal courts should apply uniform rules when deciding these points, and, as such, federal common law principles of *forum non conveniens* should be applied, rather than the particular rules of the distinct forum.[132]

As is evident from the above discussion, jurisdiction under the Warsaw Convention is no simple matter. Courts

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[126] *Id.* (citing Irish Nat'l Ins. Co., v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984).

[127] *Id.* (citing McLoughlin v. Commercial Airways (PTY) Ltd., 602 F. Supp. 29, 33 (E.D.N.Y. 1985)).

[128] Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987) (finding that Polish law would be applied in a wrongful death action brought under the Warsaw Convention in California). For a discussion of the conflict of laws issues in *Harris*, see Nancy M. Hewitt, Note, *Polish Law Governs in California Wrongful Death Action*, Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987), 12 SUFFOLK TRANSNAT'L L.J. 637 (1989).

[129] *Air Crash Disaster Near New Orleans*, 821 F.2d at 1152. *See also* Elizabeth C. Black, Note, *Further Interpretation of the Scope of Article 28*, Trivelloni-Lorenzi v. Pan American World Airways, 821 F.2d 1147 (5th Cir. 1987), 12 SUFFOLK TRANSNAT'L L.J. 173 (1988) (discussing the availability of the doctrine of *forum non conveniens* in Warsaw Convention cases in light of *Air Crash Disaster Near New Orleans*).

[130] *Air Crash Disaster Near New Orleans*, 821 F.2d at 1153.

[131] *Id.* at 1163.

[132] *Id.* at 1159. For a concise discussion, analyzed in the context of *Air Crash Disaster Near New Orleans*, of the matters of which version of the doctrine to apply and whether choice-of-law issues should enter the scenario, see Sonya Scates & Richard L. Coffman, Comment, *The Abuse of Rule 11 and Forum Non Conveniens: Fast, Effective Relief for Federal Docket Congestion?*, 7 REV. LITIG. 311, 341-44 (1988).

must go through a four-step analysis, as well as consider venue and removal questions.[133] To complicate matters, the Warsaw Convention specifically provides four bases for bringing an action before a certain court,[134] which serve to determine if a court has treaty jurisdiction.[135] Three of the four bases refer to characteristics of the carrier,[136] but the fourth is founded on destination.

IV. JURISDICTION BASED ON DESTINATION

"An action for damages [may] be brought . . . before the court at the place of destination."[137]

As noted above, destination is perhaps the farthest reaching and broadest basis for jurisdiction contained in the Warsaw Convention.[138] At the surface, destination would seem rather simple to determine. Ask anyone on an airplane: where are you going, or, what's your destination? Odds are they can tell you the answer without any hesitation. The answer, for Warsaw Convention purposes is not so simple, though, especially when things start going wrong, such as when the plane crashes and a suit is brought.

A. Issues That May Involve a Question Bearing on the Determination of Destination Under the Warsaw Convention

Asking a passenger where he is going will give you that person's definition of his destination. But, for Warsaw Con-

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[133] *See supra* notes 53-58 and accompanying text. Courts are generally free to apply their own local procedural rules, but as detailed above, the federal courts may be limited to applying only federal common law instead of local rules where the forum non conveniens doctrine is applied. *See supra* note 131 and accompanying text.

[134] Warsaw Convention, *supra* note 1, art. 28(1); *see also, supra* notes 53-79 and accompanying text.

[135] Warsaw Convention, *supra* note 1, art. 28(1).

[136] The domicile, principal place of business, and place of business through which the contract was made or purchased, listed in Article 28(1) of the Warsaw Convention, all relate to aspects of the carrier, and the domicile of the passenger and place of accident were specifically excluded from the language of the Warsaw Convention; *see infra* notes 176-199 and accompanying text.

[137] Warsaw Convention, *supra* note 1, art. 28(1).

[138] *See supra* note 77 and accompanying text.

vention purposes, that answer could easily be different than the destination that the Warsaw Convention would assign to that same passenger. If someone purchases a round-trip ticket for travel between New York and London and is asked where he is going while on the flight from new York to London, the likely response would be London. Generally speaking, though, that same person's destination would be New York under the Warsaw Convention, since courts have held that in travel involving a round-trip the destination for Warsaw Convention purposes is the place of origination.[139] This determination that destination is the place of origin in a New York to London round-trip transportation arrangement applies regardless of whether the accident occurred on the trip from New York to London.[140]

Aside from the issue of round-trip travel, there are a number of different scenarios under which the determination of destination may be an issue, which are discussed in the following sections. Lurking in all of these situations, including the above simple example of a round-trip ticket, is the question of whether the passenger's intent should have any bearing on the determination of destination. Should the contract for transportation (ticket book) be the conclusive determinant of destination, or, notwithstanding the destination listed on the ticket, should the passenger's intent control the determination of destination?

1. *Tickets Bought in a Series of Contracts, or Issued in More Than One Booklet*

If a passenger has arranged a trip for which two different books of tickets are issued, which destination controls? If an accident occurs on a flight that is covered by the first book of tickets, is the destination that which is shown in the first book of tickets, or is it the ultimate destination as designated in the last of the books? By the same token, if ar-

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[139] *See Air Crash Disaster Near Cove Neck*, 774 F. Supp. at 726; *Butz*, 421 F. Supp. at 130-31.

[140] *See infra* notes 187-198 and accompanying text.

rangements for the transportation was arranged in a series of contracts, which contract controls destination?

The Second Circuit recently addressed this exact problem in *Petrire v. Spantax, S.A.*,[141] in which the plaintiff contracted for round trip travel from Madrid, Spain to New York, by way of Malaga, Spain, and back to Madrid.[142] The tickets were issued to the plaintiff in two books, the first containing two coupons for the travel from Madrid to Malaga to New York, and the second containing one coupon for travel from New York to Madrid.[143] Although the plaintiff was injured on the Malaga to New York portion of the trip, the circuit court affirmed the district court's dismissal of the case, which was based on lack of jurisdiction because Madrid was determined to be the destination of the travel.[144]

The basis for the ruling in *Petrire* was that for Warsaw Convention purposes the determination of destination is based on the " 'single operation' of 'undivided transportation' as 'regarded by the parties,' whether that transportation is ticketed in one or a series of contracts."[145] The court also noted that it would be a far stretch to find that destination might depend on whether three coupons were attached in two books, whether the two books were stapled together, or whether the travel agent used two books be-

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[141] 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

[142] *Id.* at 264-65.

[143] *Id.*

[144] *Id.* at 265.

[145] *Id.* at 266; *see also In re* Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3, 6-7 (2d Cir. 1985) (holding that a ticket clearly showing Saudi Arabia as the final destination controlled the determination of destination despite the fact that the tickets were contained in two books); Vergara v. Aeroflat, 390 F. Supp. 1266 (D. Neb. 1975) (finding one undivided transportation encompassing a complex around the world journey in six ticket books of four coupons each, issued at one time and place). *Compare Karfunkel*, 427 F. Supp. at 973-74 (finding that two different tickets that were bought at different times in which the first portion of travel was purchased without any reference to a second leg of the transportation did not comprise one single operation of undivided transportation) *with* Stratton v. Trans Canada Air Lines, 7 Av. Cas. (CCH) ¶ 17,724 (Brit. Col. Sup. Ct. 1961) (finding distinct contracts and, hence, destinations where different books were purchased at different times and places for travel to different destinations than contemplated in the first book).

cause he didn't have books with enough coupons in them to accomplish the transaction in one book.[146]

The issue of passenger intent was raised in this case because the plaintiff alleged that a purpose for having two ticket books was to "assur[e] Article 28 jurisdiction in a desired national venue."[147] The court dismissed this contention, holding that just asking for two booklets can not change the unitary nature of the arrangement.[148] The court did not address the issue, however, in which a plaintiff, intending to travel to one specific destination, is issued a return or round trip ticket by mistake.[149]

2. *Transportation That Is Effected Through More Than One Carrier*

Another situation that raises destination questions is when more than one carrier is involved in the international transportation. For instance, it is entirely conceivable that one carrier may not be able to service the entire travel contemplated because many carriers that service cities abroad do not serve many smaller cities within the United States. If a passenger is injured on a flight from London to Abu Dhabi, on a British Airways plane, when the entire trip consists of round trip transportation between Saranac Lake, New York and Abu Dhabi by way of London, is destination affected by the fact that different carriers are involved in different portions of the transportation because no single airline served the route?

As in the case of different tickets and ticket books, analysis of the issue of successive carriers focuses on the single operation of undivided transportation concept.[150] Consequently, if the transportation contemplated is viewed as one single undivided transportation arrangement, the fact that

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[146] *Petrire*, 756 F.2d at 265.

[147] *Id.* at 266.

[148] *Id.*

[149] *Id.*

[150] *See Alleged Food Poisoning Incident*, 770 F.2d at 6-7; *Petrire*, 756 F.2d at 266; *In re* Air Crash Disaster at Warsaw, Poland, on Mar. 14, 1980, 748 F.2d 94, 96-97 (2d Cir. 1984).

different carriers provide distinct parts of the transportation will not create more than one destination—the destination for Warsaw Convention purposes will be the ultimate destination that is shown on the ticket.[151]

In the hypothetical above, it is even possible that the airline providing the transportation from London to Abu Dhabi would not have any flights into, or out of, the United States. In such a case, the Abu Dhabi airline would still be subject to jurisdiction based on destination in the United States.[152] In that instance, however, the court would still have to establish personal jurisdiction over the airline, but existing long arm statutes and minimum contacts analysis make it possible to establish jurisdiction in many of these instances.[153] For example, if an airline sold tickets from an office in the United States, that alone would probably satisfy personal jurisdiction.[154] Even sales through an agent for the airline would likely satisfy treaty jurisdiction requirements; but, a key issue would center around whether service of process upon the airline was properly executed.[155]

Even if different carriers originally were not contemplated in the transaction, the fact that a different carrier provides part of the transportation originally contemplated will not change the ultimate destination of a ticket. In *Briscoe v. Compagnie National Air France*[156] a passenger bought a ticket for travel from New York to Paris, then on to Belgrade, and back via the same route, but left the return portion of the ticket open as to time and date of departure.[157] The time and date that the passenger chose for her return was not serviced by the original carrier, and a different carrier was substituted.[158] Since the substituted carrier was a successive carrier for Warsaw Convention purposes pursu-

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[151] *Id.*

[152] Lowenfeld & Mendelsohn, *supra* note 11, at 522-26, 575-78.

[153] *Id.*

[154] *Id.* (giving a similar example through analysis of certain case law).

[155] *Id.*

[156] 290 F. Supp. 863 (S.D.N.Y. 1968).

[157] *Id.* at 864-65.

[158] *Id.* at 865.

ant to Article 30,[159] the court held that the original carrier could not be held liable.[160] But, the court did not hold that the successive carrier would not be subject to Warsaw Convention jurisdiction in the United States based on the destination of the transportation.

3. *Transportation That Involves Several Different Legs or Layovers for Extended Periods*

Air travel for vacation purposes can involve stops in more than one location, and those stops can often last for more than a few hours or days. Likewise, transportation can also involve stays at an intermediate destination for extended periods of time, as in the case of business travel. Does the fact that the transportation is not continuous in the sense of passage of time generate more than one destination?

Once again, the analysis boils down to the old single operation of undivided transportation concept. In *Vergara* the plaintiff was involved in an extended trip around the world with numerous stopping places.[161] The court held there can only be one ultimate destination, and that is the final destination shown on the ticket (in this case the last of four books).[162] In another case, where the plaintiff traveled from London to New York and back making use of a forty-five day excursion fare, despite the long stay in New York, the court held that the transportation would be viewed as one undivided arrangement for transportation, ergo, the destination was London.[163]

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[159] Article 30(2) provides: "In the case of transportation [by successive carriers], the passenger . . . can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey." Warsaw Convention, *supra* note 1, art. 30(2).

[160] *Briscoe*, 290 F. Supp. at 866-67.

[161] *Vergara*, 390 F. Supp. at 1267-68.

[162] *Id.* at 1269.

[163] *Butz*, 421 F. Supp. at 129; *see also Alleged Food Poisoning Incident*, 770 F.2d at 6 (holding that the determination of the ultimate destination is not changed by the presence of agreed stopping places en route); *Gayda*, 702 F.2d at 425 (same).

4. *Tickets That Are Purchased by Someone Other Than the Passenger Who Was Unaware of the Passenger's Actual Intent*

In one case, an employer bought a ticket for an employee's round trip travel between Canada and the Orient (including stops in Taipei, Seoul, and Hong Kong) via New York.[164] The plaintiff lived and worked in New York, contended he intended only to travel between New York and the Orient, introduced evidence of a past history of such trips, and, therefore, argued that his destination was New York.[165] The court held that there was no mutuality of agreement with respect to his intended itinerary—there was no way that the airline could have known his intent—and the destination specified on the ticket (Montreal) would control.[166] In so holding, the court left open the possibility that, where there was such mutuality of agreement, the court might look beyond the destination listed on the ticket.

5. *Tickets Bought With Open Return Provisions With Respect to Time, Date, Flight, or Carrier*

In *Aanestad v. Air Canada, Inc.*[167] a passenger bought a round-trip ticket, issued in two coupons, one for each leg of the round trip travel, from Montreal to Los Angeles. The return portion of the tickets contained open return provisions, specifying only that return travel had to be accomplished within a certain time frame.[168] The plane crashed in Canada while en route to Los Angeles.[169] The court held that the open return provision was, in effect, an option contract and not a contract for travel; the passenger could have

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[164] *In re* Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1478, 1479-80 (D.D.C. 1986), *aff'd sub nom.* Chan v. Korean Air Lines, 490 U.S. 122 (1989). The employer bought the ticket through a travel agent in Montreal to take advantage of lower fares that were apparently only available for tickets purchased in Canada. *Id.*

[165] *Id.*

[166] *Id.* at 1480.

[167] 390 F. Supp. 1165 (C.D. Cal. 1975).

[168] *Id.* at 1166-67.

[169] *Id.* at 1168.

decided not to use the return portion of the ticket.[170] Consequently, since the passenger could have intended to stay in California (not call the option) and the portion of the ticket for travel to Los Angeles was a valid contract, the destination was Los Angeles, and not Montreal.[171] Thus, the court did not directly hold that passenger intent controlled the determination of destination. Rather, classifying the open portion of the ticket as an option contract allowed the court to find an ultimate destination at a place other than that of the place of origin in a travel transaction involving a round trip.

Twelve years later, the same court placed the possibility that passenger intent could control the determination of destination squarely to rest in *Lee v. China Airlines.*[172] Following a line of reasoning critical of the *Aanestad* decision, found in *Butz v. British Airways,*[173] the *Lee* court held that even when a return provision is left open, the carrier is obligated to transport the passenger on the return segment and the passenger is obligated to pay for that segment (and did in this case).[174] As such, the contract requirement of mutuality of obligation was satisfied and a consequent binding contract for carriage resulted, thereby precluding the possibility of finding a destination other than the place of origin in a round trip travel transaction where the return provisions are left open, and also removing the chance that differing passenger intent could have any subsequent effect on the determination of destination.[175]

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[170] *Id.* at 1167-68.

[171] *Id.* at 1168.

[172] 669 F. Supp. 979 (C.D. Cal. 1987).

[173] 421 F. Supp. 127, 129-31 (E.D. Pa. 1976), *aff'd,* 566 F.2d 1168 (3d Cir. 1977).

[174] *Lee,* 669 F. Supp. at 981-82.

[175] *Id.*; *see also* Swaminathan v. Swiss Air Transp. Co., 962 F.2d 387, 389 (5th Cir. 1992); Hurley v. KLM Royal Dutch Airlines, 562 F. Supp. 260, 261 (C.D. Cal. 1983), *vacated,* 602 F. Supp. 1249 (C.D. Cal. 1985); both discussed in greater detail, *infra* at notes 175-182, and 191-198 and accompanying text.

V. SQUARELY FACING THE ISSUE OF PASSENGER INTENT

Thus far, the discussion has focused on situations where the issue of passenger intent, and its effect on the determination of destination, has been lurking on the sidelines, or has not been squarely addressed. There have been a number of cases, however, that have addressed the issue in no uncertain terms and are discussed in the following section.

A. OPEN RETURN REVISITED

In *Hurley v. KLM Royal Dutch Airlines*[176] the same court that decided *Aanestad*[177] found itself facing another open return case.[178] The plaintiff, a United States citizen and permanent resident of California, had bought a round trip ticket from Saudi Arabia to California, with intermediate stops.[179] The court concluded that, in the instance of round trip travel, at least two destinations may exist.[180]

Additionally, the court stated that the "determination of whether a particular stop constitutes a place of destination is to be determined on a case to case basis taking into account such factors as the *passenger's intent*, the nature of the stop[,] and the length of the stop."[181] In determining the proper destination in this case, the court considered the plaintiff's assertions, which were not rebutted by the defendant, that she traveled to California to be examined by and to consult with her physician and that she was not certain she would return to Saudi Arabia when she started the transportation because of her health concerns, among

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[176] 562 F. Supp. 260 (C.D. Cal. 1983), *vacated*, 602 F. Supp. 1249 (C.D. Cal. 1985).

[177] 390 F. Supp. 1165 (C.D. Cal. 1975) (holding an open return ticket to be an option, and therefore finding a destination different than the ultimate destination, or place of origin in a round trip travel transaction).

[178] *Hurley*, 562 F. Supp. at 260.

[179] *Id.*

[180] *Id.* at 261.

[181] *Id.* (emphasis added) (citing *Aanestad*, 390 F. Supp. 1165, for the proposition that the Warsaw Convention refers to at least two places of destination).

other things.[182] The court held that these facts constituted a sufficient basis to conclude that California was the appropriate destination, when combined with the plaintiff's United States citizenship, her California residency, and the open status of her return ticket.[183]

B. The Passenger Only Bought a Round Trip Ticket To Satisfy Perceived Emigration Regulations[184]

The district court for the Eastern District of New York has held that "the ultimate destination of the passenger is the place where the passenger intended to end up and would have ended up but for the accident."[185] The basis for this holding was the premise that the Warsaw Convention was not intended to impose the hardship of litigating in an unfamiliar country.[186] The court felt the Warsaw Convention must have specified the ultimate destination as an appropriate place for bringing suit because the passenger would likely have a "permanent relationship," there and, hence, that same country would have a "particular interest" in having the action brought in its courts.[187]

The *Air Crash Near Warsaw* court also held that the "intention of the passenger alone, and not the mutual intention of the parties as expressed in the contract or otherwise," controls the determination of destination.[188] But, the court went on to say that the contract should create the presump-

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[182] *Id.*

[183] *Id.*

[184] Those traveling to Caribbean destinations may discover (as I did when planning my honeymoon) that one method to gain entry to many of the islands is to show possession of a ticket either for travel on through the island to another destination, or a return to the original place of departure, that is, a round trip ticket. Thus, satisfying Immigration rules conceivably also could be a reason for buying a round trip ticket while never intending to use the return portion of the ticket. Staying on a Caribbean island for an extended period of time is, after all, not that bad a proposition for many individuals.

[185] *In re* Air Crash Disaster Near Warsaw, Poland, on May 9, 1987, 760 F. Supp. 30, 32 (E.D.N.Y. 1991).

[186] *Id.*

[187] *Id.*

[188] *Id.*

tion that the final destination is that which is listed on the ticket, with the burden of proving a different destination based on contrary intent placed on the party raising the issue.[189] In this case, the facts that the court felt rebutted that presumption were that the plaintiff's decedents were permanent residents of the United States who only bought their round trip tickets from Poland to New York because they believed that Polish law required that they purchase round trip tickets and because they feared disclosing to Polish authorities their true intention to stay in the United States.[190] One plaintiff also introduced evidence that her decedents had purchased round trip tickets on previous occasions and had returned the unused portion for reimbursement in those instances, and the other plaintiff showed that her decedent intended to return the unused portion for reimbursement.[191]

The Court recognized that giving credence to passenger intent in the determination of destination might invite litigation and fraud. But the court dismissed the allegation that their holding would induce fraud and invite increased litigation because, "in an overwhelming majority of cases, the passenger will intend to travel to the ultimate destination listed on the ticket" and resolving questions of fraud couched in contract terms would not represent a material increase in the burden on the courts.[192]

C. A Round-Trip Ticket Was Cheaper Than a One Way Ticket

Thus, we have come full circle back to the scenario that started this comment. Indeed, there are two cases in which the plaintiff tried to establish an intermediate destination based on the fact that he intended only to use one portion of the ticket, having bought a round trip ticket because it

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[189] *Id.*

[190] *In re Air Disaster Near Warsaw*, 760 F. Supp. at 32-33.

[191] *Id.* at 32.

[192] *Id.*

was cheaper than a one way ticket.[193] In *Solanki* the District Court for the Southern District of New York held that the intent objectively manifested by Solanki controlled the determination of destination, and the objective manifestation of that intent was his purchase of a round trip ticket.[194] The court went on to provide a policy rationale for its decision by saying "Kuwait Airways certainly intended to provide [the round-trip] service in return for a round-trip fare, and not to later grant a refund of Solanki's return fare while allowing him to travel to New York less expensively than he otherwise would have otherwise been able to do."[195]

The *Swaminathan* court squarely addressed the holding in *Air Crash Near Warsaw*[196] that the intent of the parties is what controlled in determining destination.[197] The court conceded that "a passenger's intent deserves considerable weight when ascertaining the final destination", but expressly rejected the contention that the passenger's intent alone, and not the objective manifestation of intent as shown on the ticket, was the means for determining destination for Warsaw Convention purposes.[198] Instead, the court held that the objective manifestation of intent expressed in the contract, and not the subjective intent of the passenger, was the controlling measure of intent.[199] Finding that the contract for Swaminathan's travel was unambiguous, clearly listing both the point of departure and

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[193] *Swaminathan*, 962 F.2d at 389 (noting also that the return portion of the ticket was left open); Solanki v. Kuwait Airways, 1987 WL 13194, *1 (S.D.N.Y. June 24, 1987) (having an open return provision).

[194] *Solanki*, 1987 WL 13194 at *2 (citing *Butz*, 421 F. Supp. 127; *Alleged Food Poisoning Incident*, 770 F.2d 3; *Gayda*, 702 F.2d 424; and *Smith v. Canadian*, 452 F.2d 798, for the contention that the place of origin is the place of destination in round trip travel as determined by reference to the ticket without consideration of passenger intent).

[195] *Solanki*, 1987 WL 13194 at *2.

[196] 760 F. Supp. 30 (discussed in detail, *supra* notes 183-190 and accompanying text).

[197] *Swaminathan*, 962 F.2d at 389.

[198] *Id.*

[199] *Id.* The court noted that in interpretation of contracts, subjective intent controls, and unambiguous contracts are the express manifestations of that subjective intent themselves. *Id.* (citing Shelton v. Exxon Corp., 921 F.2d 595 (5th Cir. 1991)); Fuller v. Phillips Petroleum Co., 872 F.2d 655 (5th Cir. 1989).

destination on the ticket with only the exact date and time for the return uncertain, the court held that the point of departure and destination were one and the same, disregarding Swaminathan's statement of his subjective intent to the contrary.[200]

VI. CONCLUSION

As detailed above, only a handful of cases have decided that the passenger's subjective intent has bearing on the determination of destination for jurisdictional purposes under the Warsaw Convention.[201] In one case, the same court that found intent has bearing on the determination in two early cases later rejected the proposition.[202] The court in *Alleged Food Poisoning Incident*[203] found intent to have some place in the analysis, but the intent that was considered was the intent of the parties, that is, the objective manifestation of intent, or the terms of the contract, not the subjective intent of the passenger.[204] The only case that has flatly held that the passenger's subjective intent is the sole deciding factor in determining destination under the Warsaw Convention and which has not been rejected by a court in the same district is the Second Circuit's *Air Crash Disaster Near Warsaw.*[205] That holding was expressly rejected by the Fifth Circuit in *Swaminathan* as being both an unworkable standard and inconsistent with the rules for construing contracts.[206]

The Warsaw Convention is a treaty entered into by the United States, and thus, is afforded the status of the

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[200] *Id.* (citing *Korean Air Lines Disaster*, 664 F. Supp. 1478; *Lee*, 669 F. Supp. 979; and *Petrire*, 756 F.2d 263).

[201] *See supra* notes 135-189 and accompanying text, specifically noting *Alleged Food Poisoning Incident*, 770 F.2d 3; and *Air Crash Disaster Near Warsaw*, 760 F. Supp. 30; *Hurley*, 562 F. Supp. 260; *Aanestad*, 390 F. Supp. 1165.

[202] *Lee*, 669 F. Supp. at 981 (expressly rejecting *Aanestad*, 390 F. Supp. 1165).

[203] 770 F.2d 3 (2d Cir. 1985).

[204] *Alleged Food Poisoning Incident*, 770 F.2d at 5-6.

[205] 760 F. Supp. at 32.

[206] *Swaminathan*, 962 F.2d at 389.

supreme law of the land.[207] In construing the treaty, courts must follow the plain language of the treaty unless it is ambiguous.[208] Courts may only resort to the drafting history of the Warsaw Convention when the language is ambiguous, only contradicting the natural meaning by clear drafting history.[209] In its jurisdictional provision, the Warsaw Convention refers to destination in the singular.[210] Therefore, for any given transportation arrangement, there can be only one destination. Numerous courts have held that, in the instance of round trip travel, there is only one destination—the place of origin as referenced on the ticket.[211]

In determining whether the Warsaw Convention applies at all, the Convention itself clearly refers to the place of origin and place of destination as being determined by the

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[207] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added). For cases specifically holding that the Warsaw Convention is the supreme law of the land see Sulewski v. Federal Express Corp., 933 F.2d 180, 182 (2d Cir. 1991); O'Rourke v. Eastern Air Lines, 553 F. Supp. 226, 228 (E.D.N.Y. 1982); *Karfunkel*, 427 F. Supp. at 974; Sofranski v. KLM Royal Dutch Airlines, 326 N.Y.S.2d 870, 871 (N.Y. City Civ. Ct. 1971); *see also* Bianchi v. United Air Lines, 587 P.2d 632, 634 (Wash. App. 1978) (holding that the Warsaw Convention preempts state law).

The constitutionality of the Warsaw Convention has also been addressed, specifically with reference to the jurisdictional provision contained in Article 28. In Lee v. China Airlines, 669 F. Supp. 979 (C.D. Cal. 1987), the plaintiffs alleged that the Warsaw Convention was unconstitutional, alleging three specific reasons. *Id.* at 982. First, they argued the Warsaw Convention constituted a due process violation in that it impaired their fundamental right to international travel. *Id.* Second, they argued an equal protection violation because the Warsaw Convention treats diverse passengers differently depending solely on the contents of their tickets. *Id.* And, third, they argued that the jurisdictional provision violated their due process rights in that it prevented them from being able to have their tort claim heard in the United States. *Id.* The court found that the Warsaw Convention was constitutional in these respects, finding all three arguments to be without merit. *Id.* at 982-85.

[208] Chan v. Korean Air Lines, 490 U.S. 122, 134 (1989).

[209] *In re* Air Disaster Near Honolulu, Haw. on Feb. 24, 1989, 792 F. Supp. 1541, 1548 (N.D. Cal. 1990); *Air Disaster Near Cove Neck*, 774 F. Supp. at 728-29.

[210] Warsaw Convention, *supra* note 1, art. 28(1).

[211] *See, e.g., Swaminathan*, 962 F.2d at 389; *Air Crash Near Cove Neck*, 774 F. Supp. at 727; *Alleged Food Poisoning Incident*, 770 F.2d at 6-7; *Petrire*, 756 F.2d at 265-66; *Lee v. China Airlines*, 669 F. Supp. at 981.

contract made by the parties.[212] As in the case of the terms of the convention, construction of the contract for carriage is based on the plain language of the contract where it is unambiguous, with the objective manifestation of intent of the parties being the ticket.[213] Numerous courts have determined applicability of the Warsaw Convention and, consequently, destination based on the ticket itself, disregarding any conceivable manifestations of the passenger's contrary intent.[214]

If one considers the Warsaw Convention's language with regards to destination, and contracts for carriage determining that destination, as ambiguous, the next step would be to construe the convention to give effect to the shared intentions of the High Contracting Parties who formulated it, taking into account only legislative history that is clear.[215] Some of the primary purposes of the Warsaw Convention were to limit liability, limit the number of places in which an action could be brought, and establish uniformity in the rules dealing with international air travel.[216]

To be certain, allowing a passenger's subjective intent to control the determination of destination would be a step away from uniformity, since, as noted above, nearly all courts take the other position. Moreover, it would contravene the purpose of limiting the available places in which a claim could be brought. The United States was not happy with the provisions for jurisdiction contained in the Warsaw Convention, and argued for jurisdiction based on the place of accident[217] and nationality,[218] neither of which appeared in the final product. The discussion on the floor of the

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[212] Warsaw Convention, *supra* note 1, art. 1(2).

[213] *See supra* notes 175-198 and accompanying text.

[214] *Id.*

[215] Air France v. Saks, 470 U.S. 392, 399 (1985); *see also, supra* notes 201-202 and accompanying text.

[216] *See supra* notes 31-52 and accompanying text.

[217] G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention, Part I.*, 26 J. AIR L. & COM. 217, 229 (1959) (citing Warsaw Conference Documents).

[218] G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention, Part II.*, 26 J. AIR L. & COM. 323, 335 (1959).

Warsaw Convention regarding the place of the accident revealed these comments:

> [T]he place of accident has absolutely no connection with the contract or with the place to which the parties are considered to have given jurisdiction. Ordinary contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract.[219]

Shortly after this speech made by the British delegate, making very clear the emphasis on the contract's relation to jurisdiction, the British proposal to eliminate the place of accident provision in the jurisdiction clause was put to a vote and approved.[220] While a world in which everyone's subjective manifestations of intent were given full effect under the law would be wonderful indeed, doing so in the context of determinations of destination for jurisdictional purposes under the Warsaw Convention would be contrary to the plain language of the Warsaw Convention itself and the great weight of court decisions in the United States. Finally, evaluating passenger intent would be contrary to the clear purpose of the Warsaw Convention to provide for uniformity, because evaluating intent would create uncertainty and result in varying and unpredictable results in situations involving questions of jurisdiction under the Warsaw Convention based on destination.

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[219] *Calkins, supra* note 215, at 229 (quoting Mr. Clarke, delegate from Great Britain).

[220] *Id.* at 230.